No. 520

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

IN THE MATTER OF THE LIQUIDATION

of

NATIONAL SURETY COMPANY

Claim of WILLIAM F. LAUGHLIN, as Administrator *de bonis non* of the Estate of Wesley Cooper, Deceased.

Claim No. C. B. 2262.

WILLIAM F. LAUGHLIN, etc.,

Petitioner,
(Claimant-Appellant below)

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of National Surety Company,

Respondent.
(Petitioner-Respondent below)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

ALFRED C. BENNETT,
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BRIEF FOR THE RESPONDENT IN OPPOSITION.

The Opinions Below.

The opinion of the Court of Appeals is reported in 283 N. Y. 68, and is appended to the record. Neither the Appellate Division of the Supreme Court, First Department, nor

the Special Term of the Supreme Court, New York County, rendered opinions. The report of the referee appears in the record (fols. 142-163) and is not otherwise reported.

Questions Presented.

1. Whether the final decree entered in an action instituted by service of process upon the former statutory agent in the State of Mississippi against National Surety Company after its dissolution in the State of New York, was binding on its Liquidator in the State of New York and entitled to full faith and credit in the State of New York?

2. Whether, in view of the admission of National Surety Company to do business in the State of Mississippi as a foreign corporation accompanied by its charter and the statutory laws applicable to its creation and dissolution, the revocation of the authority of the statutory agent of National Surety Company in Mississippi by operation of law on the dissolution of its corporate existence in New York, impairs the obligation of contracts made in Mississippi and violates Article 1, Section 10 of the United States Constitution?

Statement.

On September 14, 1932 National Surety Company executed a bond (fols. 106-110) in the sum of $6,000.00 for Robert L. Jayne, as administrator of the estate of Wesley Cooper, deceased in favor of the State of Mississippi; on September 20, 1932 said bond was filed in the Chancery Court of Washington County, State of Mississippi. The entire estate received by the administrator was the sum of $5,847.00, the proceeds of a war risk insurance policy covering the life of Wesley Cooper as a soldier of the United States in the World War of 1914-1918 (fol. 76).

On June 1, 1934 the Superintendent of Insurance of the State of New York, pursuant to Article XI of the New

York Insurance Law, was authorized and directed by order of the Supreme Court of the State of New York, New York County (fols. 116-141) to forthwith take possession of and liquidate the business and property of National Surety Company. Said order further provided for the filing of claims on or before April 1, 1935 (fols. 134, 135), for the dissolution of the Company's charter (fol. 140), for the vesting of title in the Superintendent as Liquidator of all the property, contracts and rights of action of said Company (fol. 123), for the restraining and enjoining of directors, officers, agents, etc., from the further transaction of any of the business of the Company or from permitting anyone to obtain judgments against said Company or its liquidator (fols. 137, 138), and for the restraining and enjoining of any and all persons from bringing or further prosecuting any action at law, suit in equity, or proceeding, special or otherwise (fols. 138-140).

On April 5, 1934, by decree of said Mississippi Chancery Court, Robert L. Jayne was removed as administrator and one Bessie C. Hillery an alleged heir of the deceased, was duly appointed as administratrix *de bonis non* (fol. 90). On February 18, 1935 said administratrix filed proof of claim with the Liquidator of National Surety Company (fols. 85-95) in the sum of $1,847.00 with interest, wherein is recited the facts of the removal of Robert L. Jayne, the appointment of Bessie C. Hillery, that Robert L. Jayne, as administrator had distributed only $4,000.00 of said $5,847.00, that Robert L. Jayne had been directed to pay over to the administratrix the remaining sum of $1,847.00 and his failure to make said payment.

On September 11, 1935 by decree of said Chancery Court, Bessie C. Hillery was removed as administratrix and on the following day, William F. Laughlin (hereinafter referred to as "Claimant") was appointed administrator *de bonis non* (fols. 96, 97).

On October 3, 1935 the Claimant filed with the Liquidator an amended proof of claim (fols. 96-101) in which he states

that following the filing of the original proof of claim, it was discovered that one Mimie Cooper was the surviving lawful widow of the deceased herein and entitled to the entire estate; that Bessie C. Hillery had received $1,000.00 of the $4,000.00 distributed by Robert L. Jayne; that the entire distribution of $4,000.00 was an unlawful disbursement; and that there was a misappropriation of the sum of $1,847.00. Claim was thus made for the sum of $5,847.00 representing the original estate as received by Robert L. Jayne.

On March 12, 1936 in an action entitled *"Mimie Cooper et al., Plaintiffs* v. *National Surety Company, Defendant"*, in the aforementioned Chancery Court a decree *pro confesso* (fols. 70-72) and a final decree (fols. 73-80) were made and filed. The former decree recited that National Surety Company had been duly served with a summons in said action and had wholly defaulted in appearing therein; the latter, after setting forth the appointment of Robert L. Jayne and his alleged wasting of the estate, adjudged that Mimie Cooper was the sole distributee of said estate and that she was entitled to recover from the National Surety Company the sum of $6,709.52 for which the Claimant was forthwith directed to file with the Liquidator of National Surety Company.

The claim not having matured on or before April 1, 1935 and being purely contingent under our laws, the Liquidator recommended the amended claim for disallowance to the Supreme Court, New York County; the Claimant filed objections thereto (fols. 101-106). The issues thus raised were referred to a Referee to hear and report.

Although the statement of facts herein and those found in the proof of claim (fols. 85-95) and the amended proof of claim (fols. 96-101) tend to show a misappropriation of the Estate herein, either in whole or in part, the only evidence offered by the Claimant on the hearings before the Referee in substantiation of the amended claim was the production of the decree *pro confesso* (fols. 70-72) and the final decree (fols. 73-80) whereby, after its liquidation,

National Surety Company, not its Liquidator, was allegedly served in an action in the Chancery Court of Washington County, Mississippi, and was declared liable under the bond herein on default in answering. No attempt was made to prove any wrongdoing by Robert L. Jayne whom National Surety Company bonded. In fact, this procedure was commented on by the Referee at the hearing (fols. 42-44).

The Referee's report was confirmed by order of Special Term of the Supreme Court, New York County (fols. 10-14). The Appellate Division of the Supreme Court, First Department unanimously affirmed said order (R. 58) and the Court of Appeals, after granting leave to appeal, unanimously affirmed the latter order (R. 73) with opinion (R. 62).

Summary of Argument.

The corporate existence of National Surety Company was dissolved pursuant to Article XI (now Article XVI) of the Insurance Law of the State of New York. The authority and functions of all agents, including statutory agents, were immediately revoked. All actions pending or thereafter instituted abated and judgments thereafter entered were null and void against the assets in the State of New York. The Mississippi decree in favor of the Claimant, even according to the law of Mississippi, and if valid at all, was valid only as to assets in Mississippi but was without force or effect in New York which was not called upon to accord full faith and credit to the decree. The designation of the statutory agent in Mississippi carried with it the revocation thereof upon dissolution which was contemplated by contracting parties in Mississippi and thus the contracts were not impaired when revocation occurred.

POINT I.

The decree entered in Mississippi is null and void as to assets held by the Liquidator of National Surety Company in New York and is not entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.

A.

On the entry of the order of liquidation dated June 1, 1934, the corporate charter of National Surety Company was dissolved and its corporate existence terminated pursuant to the provisions of the Insurance Law of the State of New York.

The Claimant, to sustain his claim against the assets of National Surety Company, did not offer any common law proof of the alleged wrongdoing by Robert L. Jayne, the principal on the bond of National Surety Company, but relied solely on a decree *pro confesso* (fols. 70-73) and a final decree (fols. 73-80) both of which were entered against National Surety Company in the Chancery Court of Washington County, State of Mississippi, in an action instituted in said Court subsequent to June 1, 1934, the date of the order of liquidation and of the dissolution of National Surety Company.

A corporation is domiciled in the state of its incorporation; it is a creature of, and its continuance is dependent upon, the laws of that state (*Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 193). As an artificial entity the legislature that instilled its life, has conversely the exclusive power to cut off, dissolve and revoke its existence (*People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y. 174, 179; *Ewen* v. *American Fidelity Co.*, 271 Fed. 848, 853).

National Surety Company was incorporated under the Insurance Laws of the State of New York. On June 1, 1934 by order of the Supreme Court of the State of New York,

New York County (fols. 115-141) it was placed in liquidation under the Superintendent of Insurance of the State of New York pursuant to Article XI of the Insurance Law of the State of New York (L. 1932, ch. 191, now Article XVI as amended by L. 1939, ch. 882). The order provided for the dissolution of the Company (140).

The New York Courts were called upon to interpret the statutes of the State of New York as to whether the dissolution of the Company was governed by the General Corporation Law (Cons. Laws, ch. 23, Section 29) providing for continuance of corporations generally for winding up corporate affairs or the Insurance Law (Cons. Laws, ch. 28, Section 407, now section 525 in substance), providing for immediate cessation of corporate existence. The conflict between the provisions of these statutes is governed by General Corporation Law, Section 6, which was held to be applicable herein.

This section reads as follows:

> "If there be in any other corporate law a provision which conflicts with any provision of this chapter or of the stock corporation law, the provision of such other corporate law shall prevail, and the conflicting provision of this chapter or of the stock corporation law shall not apply in such case. If there be in any other corporate law a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict therewith, both provisions shall apply."

In accordance therewith the Court of Appeals and the lower Courts with unanimity found that the Insurance Law prevailed and that the corporate existence of National Surety Company ceased on June 1, 1934. This interpretation of the New York Statutes is the law of this case and will be recognized as such by this Court (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78).

The *rationale* behind the rule or provision of law in this State (Article XI of the old law—Article XVI of the present

law), providing for the dissolution of corporations upon their insolvency and the enjoining suits then pending or about to be brought in this State or elsewhere, is clearly to protect all the creditors of the dissolved company, to secure uniformity of decision, by compelling the adjudication of all claims in the New York liquidation proceedings, to insure a speedy determination of the outstanding liabilities, to maintain an orderly process of liquidation and to relieve the Liquidator and the assets of the insolvent company from the expense and annoyance of defending suits in all the other States of the Union.

Practically, a liquidator could neither afford to defend actions brought in other states because of the prohibitive expenses involved nor could he afford to allow the suits to proceed undefended, if judgments by default become allowable claims without further competent proof other than the judgment itself, because of the injustice that would result to creditors in the state of dissolution by the unwarranted depletion of the assets from which dividends would be declared.

B.

All actions either pending or thereafter instituted abated upon the dissolution of National Surety Company and judgments subsequently entered are null and void. The decree entered herein is null and void, has no extraterritorial effect and is not entitled to full faith and credit in the State of New York.

All persons who contracted or did business with the National Surety Company had constructive knowledge of the statutes governing its liquidation and termination of its corporate existence on dissolution, and are bound by said statutes containing the rules and regulations of such liquidation (*People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y. 174, 179; *Jemison* v. *C. S. Bank*, 122 N. Y. 135, 140; *Susquehanna Line, Inc.* v. *Auditore*, 223 App. Div. 585, 588). This is likewise true as to persons outside the state of incor-

poration (*Relf* v. *Rundle,* 103 U. S. 222, 225; *Canada Southern Railroad Co.* v. *Gebhard,* 109 U. S. 527, 537; *Martyne* v. *American Union Fire Insurance Co.,* 216 N. Y. 183, 193).

Since the corporate existence of National Surety Company ceased for all purposes, everywhere on June 1, 1934 the common law rule became applicable that on dissolution of a corporation all actions pending or thereafter instituted abated and judgments thereafter entered are null and void.

First National Bank of Selma v. *Colby,* 88 U. S. 609, 615; (21 Wall);
Pendleton v. *Russell,* 144 U. S. 640, 645; affirming *People* v. *Knickerbocker Life Insurance Co.,* 106 N. Y. 619;
Oklahoma Natural Gas Co. v. *Oklahoma,* 273 U. S. 257, 259;
Rodgers v. *Adriatic Fire Insurance Co.,* 148 N. Y. 34, 38;
Ewen v. *American Fidelity Co.,* 271 Fed. 848, 851 (C. C. A. 2nd).

The statutes of a foreign jurisdiction can in no way change, modify or nullify the effectiveness of the dissolution of a corporation in the state of incorporation (*Marion Phosphate Co.* vs. *Perry,* 74 Fed. 425; *Clinton* v. *Coppedge,* 2 Fed. Supp. 935; *Sinnott* v. *Hanan,* 214 N. Y. 454, 458; *Matter of Lehrich* v. *Sixth Avenue Bancorporation, Inc.,* 251 App. Div. 391, 394) and even though said statutes continue the corporate life of all corporations after dissolution for a particular time, as far as dissolved foreign corporations are concerned, these only apply to winding up the affairs of such corporations located in the foreign jurisdiction (*Restatement, Conflict of Laws,* Section 158, Chapter 6, Subdivision d, page 230). Thus judgments, entered against the dissolved corporation in a foreign jurisdiction, are null and void in the state of incorporation and are only valid as to local assets found in the foreign jurisdictions (*Rawlings* v. *American Oil Co.,* 173 Miss. 683; 161

So. 851, 854; *Oliner* v. *American Oriental Banking Corp.*, 252 App. Div. 212; affirmed 277 N. Y. 588).

In the Rawlings case, *supra*, the Supreme Court of Mississippi in construing and determining the validity of a judgment entered in Mississippi against the New York Indemnity Company after its dissolution in New York and entered after service of process upon the statutory agent in Mississippi found that Section 4171, Mississippi Code of 1930, changed the common law rule on the abating of all actions on dissolution and held that although corporations both domestic and foreign continue for a period of three years after dissolution that "only the assets of a foreign corporation located in this State could be affected."

The decree of Claimant was therefore valid only against assets of the former National Surety Company in Mississippi, had no extraterritorial effect and was not entitled to full faith an dcredit in the State of New York as against assets in the possession of the Liquidator of National Surety Company.

The authorities relied upon by the claimant are inapplicable to the facts herein. In *Clark* v. *Williard*, 292 U. S. 112 this Court was not confronted with an attempt by a creditor to satisfy his claim out of assets held by the domiciliary liquidator in the state where the corporation was dissolved but rather with an execution on funds of the dissolved corporation in the state where the claimant resided. It is submitted that the State of Mississippi has already declared its policy in this respect (*Rawlings* v. *American Oil Co.*, 173 Miss. 683; 161 So. 851).

In *Washington ex rel. Bond and Goodwin and Tucker* v. *Superior Court*, 289 U. S. 361 this Court had for determination the effect of service of process on a statutory agent after the withdrawal of the foreign corporation from the state where service was made and not the effect of the revocation of the authority of the statutory agent upon the dissolution of the foreign corporation in the state of incorporation.

POINT II.

Service of process on statutory agent of foreign corporation after dissolution of corporate existence in state of incorporation, is a nullity.

National Surety Co. v. *Cobb*, 66 Fed. (2d) 323, 325 (C. C. A. 5th); certiorari denied 54 Sup. Ct. Rep. 127;

United States Truck Company v. *Pennsylvania Surety Corp.*, 259 Mich. 422; 243 N. W. 311, 312;

Robinson v. *Mutual Reserve Life Insurance Co.*, 182 Fed. 850, 855; affirmed 189 Fed. 347;

Restatement, Conflict of Laws, Section 158, Chapter 6, subdivision c. page 229;

Burns v. *Niagara Life Ins. Co.*, 279 Pa. 453, 124A. 128.

POINT III.

The revocation of the designation of a statutory agent in Mississippi upon the dissolution of National Surety Company in the State of New York neither impaired the obligations of contracts nor violated Article 1, Section 10 of the Constitution of the United States.

All persons in Mississippi who entered into contracts with National Surety Company after its admission to do business, had constructive knowledge of the charter of said company, its powers and limitations, and the statutory laws of creation and dissolution.

Relf v. *Rundle*, 103 U. S. 222, 225;

Canada Southern Railroad Co. v. *Gebhard*, 109 U. S. 527, 537;

Martyne v. *American Union Fire Insurance Co.*, 216 N. Y. 183, 193.

In contemplation, therefore, was the absolute cessation of corporate life, the restraining of officers and employees from further representing the company and the revocation of the authority of any of its agents, including statutory agents upon its dissolution in New York.

All contracting parties, thus, knew that the designation of the statutory agent was subject to immediate revocation upon the death of the corporate principal. The Court of Appeals construed this designation and revocation when it said "This designation was analogous to a power of attorney granted by an individual, which ceases upon the death of that individual" (R. 67).

Under these circumstances no contractual right of the Claimant was impaired in violation of Article 1, Section 10 of the United States Constitution.

It is submitted that none of the cases relied upon by Claimant are applicable to the situation where the designation of the statutory agent is revoked by the dissolution of the foreign corporation in the state of incorporation.

CONCLUSION.

It is therefore respectfully submitted that the decision of the court below was correct and that no federal question is presented for review. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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